

Atlantic-Pacific Construction Co., Inc. d/b/a Atlantic-Pacific Management and Larry Davis. Case 20-CA-24282

September 20, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On April 16, 1993, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting brief.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Atlantic-Pacific Construction Co., Inc. d/b/a Atlantic-Pacific Management, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Jonathan J. Seagle, Esq., for the General Counsel.
Fred W. Kaiser, Esq., of Sacramento, California, for the Respondent.
Steven T. Seligman, Esq., of Sacramento, California, for the Charging Party.

DECISION

GORDON J. MYATT, Administrative Law Judge. On a charge filed by Larry Davis (Davis), an individual, against Atlantic-Pacific Construction Co., Inc. d/b/a Atlantic-Pacific Management Co. (the Respondent), the Acting Regional Director for Region 20 issued a complaint and notice of hearing on November 22, 1991. The complaint alleges the Respondent discharged Davis on September 27, 1991,¹ for engaging in protected concerted activities, and thereby violated Section 8(a)(1) of the National Labor Relations Act (the Act), as amended. 29 U.S.C. § 151 et. seq.

The Respondent filed an answer in which it admitted certain allegations of the complaint and specifically denied vio-

lating the Act. The Respondent's answer also denied Board jurisdiction over its business operations.²

A hearing was held in this matter on June 2, 1992, in Sacramento, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Counsel for the Respondent argued orally at the conclusion of the hearing and a brief has been submitted by the General Counsel. The oral argument and the brief have been fully considered in arriving at this decision.

On the entire record in this matter, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Atlantic-Pacific Construction Co., Inc. d/b/a Atlantic-Pacific Management Co., is a California corporation engaged in providing management services to owners of apartment buildings and houses. Respondent maintains its principal place of business in Los Angeles, California, and during the 12-month period ending December 1990, Respondent, in the course of its business operations, provided services in excess of \$50,000 to enterprises within the State of California.

Parcwood-Sacramento Joint Venture (Joint Venture), a California partnership owned by Parcwood-Sacramento, Ltd. and Connecticut General Life Insurance Company, has owned an apartment building complex called the Parcwood Apartments (Parcwood), located in Sacramento, California, and has contracted with the Respondent to manage the complex. During the 12-month period ending December 31, 1991, the Respondent, in the course of its business operations, received in excess of \$50,000 for providing management services at Parcwood. During the same time period, Joint Venture received rental payments in excess of \$2500 directly from outside the State of California and derived revenues in excess of \$500,000 for the rental of units at Parcwood.

The Respondent's answer denies that its comes under the jurisdictional standard established by the Board for employers engaged in the apartment house industry. I find the contention that the Board lacks jurisdiction in this matter to be without merit.

The Board has established a \$500,000 discretionary standard for asserting jurisdiction over residential apartments. *Parkview Gardens*, 166 NLRB 697 (1967); See also *LSM Management Co.*, 300 NLRB 472 (1990). The pleadings here admit that Joint Venture derived revenues in excess of \$500,000 for the rental of apartment units at Parcwood during the 12-month period ending December 31, 1990. It is evident therefore, that the discretionary standard for assertion of jurisdiction over the complex itself has been met. Since the Respondent provides the management services for the complex, it follows that its operations fall within the standard applied to the complex and have an impact on commerce. *James Johnston Property Mgt.*, 221 NLRB 301 (1975). Additionally, the pleadings admit that Joint Venture received rentals for units at Parcwood in excess of \$2500 directly from

² The complaint was amended at the hearing to permit the stipulation of certain jurisdictional facts by the parties. The Respondent's denial of jurisdiction is based on the stipulation.

¹ All dates herein refer to the year 1991 unless otherwise indicated.

sources outside the State during the year 1990. This source of revenue from across state lines is more than de minimis and satisfies the Board's statutory standard for asserting jurisdiction. *Pioneer Concrete Co.*, 241 NLRB 264 (1979); *Dr. J. W. Gilmartin*, 220 NLRB 1312, 1313 (1975).

In view of the above, I find the Board's jurisdictional requirements have been satisfied here. Accordingly, the record establishes that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Operational Structure of the Respondent*

Arpad Domyan, the president of the Respondent, maintains his office at the Respondent's main location in Los Angeles, California. During the time of the events here, Respondent's management operation at Parcwood was under the direction of Kelly Ashwell, the on-site property manager, who reported directly to Domyan. In addition to Ashwell, the front office staff consisted of a leasing agent and a bookkeeper. The so called "back-of-the-house" employees consisted of a maintenance engineer, a custodian, two housekeepers, three gardeners, and painters. The record also indicates that the Respondent utilized security personnel at the complex.

The undisputed testimony clearly demonstrates that Ashwell directed and scheduled the work of all the Respondent's employees at Parcwood, made effective recommendations for the hiring of new employees, terminated employees without consulting Domyan, and annually evaluated the job performance of the employees and made effective recommendations for wage increases. Therefore, the Respondent's contention that Ashwell is not a supervisor and agent of the Respondent, within the meaning of Section 2(11) and (13) of the Act, is rejected. Also, the contention that Domyan, as president of Respondent, is not a supervisor and agent of the Respondent within the meaning of the Act is rejected.

B. *The Termination of Davis' Employment*

Davis was first hired to work at Parcwood by the Respondent in September 1987 as the security supervisor. In April 1990, he was promoted to the position of bookkeeper at the facility and worked in the front office with Ashwell and Martis Hart, the then leasing agent. Davis also occupied an apartment unit in the complex at a reduced rental rate. The reduced rental, however, was not a benefit which Davis received as an employee of the Respondent. Rather, it was geared to a rental supplement, based on income, for which Davis qualified under a "Bond Program."³

The undisputed testimony indicates that after Davis became the bookkeeper, he had ongoing disputes in the office with Hart over errors in his bookkeeping work and, apparently, entitlement to commissions for rentals of apartment units. On May 7, Ashwell issued a letter of reprimand to Davis regarding deficiencies in his job performance, his general attitude, and other work habits. The reprimand also stated that Davis made too many errors in his bookkeeping and

failed to make the bank deposits in a timely fashion. (See G.C. Exh. 2.) Although Davis testified he continued to perform his duties in the same manner after the reprimand, there is no evidence in the record that he received any subsequent warnings from Ashwell regarding his job performance.

Apparently in early September, Ashwell gave the Respondent notice that she was leaving her job at Parcwood to take another position. Davis testified that on September 13, he was approached by one of the gardeners, Richard Keenan, who expressed concern over the fact that Ashwell was leaving as property manager and possibly would be replaced by Hart. According to Davis, Keenan stated he and other employees felt that if Hart became the property manager, she would change their working conditions. Specifically, that Hart would require the employees to clean the apartments which became available for rental at a much faster rate.⁴ Davis further testified that Keenan asked if Davis, who had access to the fax machine in the office, would send a letter to Domyan expressing the employees' concern over the possible selection of Hart as the manager. Davis agreed to do so provided all of the employees signed the letter.

Later that same day, according to Davis, he spoke with Gary Garvin, another gardener. Davis asked Garvin if he thought his working relationship with Hart would change if she became the manager. Garvin expressed concern that his hours would be changed if someone other than Ashwell were manager. Garvin indicated he would sign a letter to Domyan setting forth employee concerns, if one were written.

Davis stated that subsequent to his conversation with Garvin, he spoke with several other employees about the effect the possible appointment of Hart to the manager's position would have on their working conditions. He testified he spoke with Edith Ramiriz (housekeeper), Richard Price (rug shampooer), William Murenness (painter), and Karen McLish (housekeeper). All the employees, according to Davis, agreed to sign a letter to Domyan, if one were drafted.⁵

On September 17, Davis drafted a letter to Domyan requesting that an outside manager be appointed to succeed Ashwell. The letter stated the employees considered Hart "an unreasonable and difficult person to work with" and they "would consider another job offer," if Hart became manager temporarily or permanently. (G.C. Exh. 3.) After the employees signed the letter, Davis faxed it to Domyan's office in Los Angeles.

There is additional testimony in the record regarding Davis' personal antipathy toward Hart. Lance Lockhart, a former tenant of Parcwood, stated that he and Davis were discussing Hart's possible appointment to the position of property manager in September, after it became known that Ashwell was leaving.⁶ According to Lockhart, "Davis said if that bitch [Hart] got the job he was going to quit the very next fucking day." When questioned as to the basis for

⁴Davis stated that 72 hours was the normal time span to clean an apartment for rental. As the leasing agent, according to Davis, Hart would schedule rentals for a shorter cleanup period.

⁵None of the employees to whom Davis spoke regarding Hart were called as witnesses in this proceeding.

⁶While he was a tenant, Lockhart was apparently on disability and spent a considerable amount of time in and around the front office of the complex. He also occasionally worked part time for the Respondent in the front office and was on friendly terms with the office staff, including Davis.

³The record is unclear as to whether the Bond Program was a local, state, or Federal program. Ashwell processed Davis' application to enable him to qualify for the lower rental rate.

Davis' opposition to Hart, Lockhart relied, "He didn't like Martis [Hart] at all." Lockhart testified that when he first met Davis, the latter told him that Hart would "stab you in the back, cut your throat." Lockhart further testified that during the conversation in September, Davis made no mention of the possible impact that Hart's selection as manager would have on the working conditions of the employees.

According to the testimony of Davis he had a conversation with Ashwell on September 23, in which she informed him that the Parcwood complex was being sold, and she was utilizing a placement service to find new employment. She further advised Davis that when new owners took over a property, they usually terminated the managers and the bookkeepers. Davis testified he then asked for and received a blanket letter of recommendation from Ashwell to assist him in searching for employment elsewhere. (G.C. Exh. 5.)

The record establishes that Domyan came to the complex on September 27 and spoke to each of the employees individually. Davis testified that he met with Domyan in the security office. According to Davis, Domyan said he was "disappointed" in Davis and that Davis was not a "team player." Davis testified that Domyan said he did not like being given an "ultimatum," and that he was selecting Hart to be the property manager. Davis further testified that Domyan then handed him two checks, one representing his final pay check and the other representing severance pay, and instructed him to leave the premises immediately. Domyan also gave Davis a 30-day notice to vacate the apartment he was renting in the complex.

Domyan, on the other hand, testified that after he received the faxed letter from the employees objecting to selection of Hart as manager, he called Ashwell about the matter. According to Domyan, Ashwell could not give him a satisfactory explanation other than to point out that there was a personality conflict between Davis and Hart. Domyan said the conflict was the result of disputes over commissions and the fact that Davis had not properly performed his duties as bookkeeper.

Domyan stated that when he met with Davis on September 27, he asked the employee whether he authored the letter objecting to Hart. According to Domyan, Davis denied that he did so. Domyan asked if Davis had read the letter and understood its contents. When Davis said he did, Domyan told the employee that he was going to appoint Hart to the position of property manager. Domyan then told Davis that he had no other alternative but to accept Davis' resignation in accordance with the letter.

Domyan further testified that prior to coming to Parcwood, he had checks made out for all the employees, in the event anyone wanted to resign and leave the property because of his selection of Hart. According to the testimony of Domyan, none of the other employees chose to resign, and several informed him that they were "coerced" into signing the letter by Davis. He was unable, however, to identify the particular employees who asserted they were coerced.

On September 30, Domyan sent a letter to Davis setting forth the circumstances of the termination of Davis' employment from the Respondent's perspective. In the letter, Domyan acknowledged Davis' "verbal resignation rendered on September 27, 1991," and stated that the employee had been given his final paycheck and a severance check on that date. (G.C. Exh. 4.)

Concluding findings

The main thrust of the Respondent's defense in this matter is that Davis was not engaged in protected concerted activity in expressing his opposition to the selection of Hart as the property manager. Rather, the Respondent contends that Davis opposed the selection of Hart solely for reasons resulting from the personal antipathy which existed between them, and this was unrelated to any impact Hart's selection would have on the working conditions of the employees at Parcwood. Contrary to the Respondent, I find the facts here do not support the Respondent's contention.

Although not well drafted, the letter of September 17 opposing the selection of Hart as the property manager demonstrates the employees' collective concern about the effect Hart's selection would have on their working conditions at Parcwood. Indeed, if any doubt existed as to this being the underlying motive for the opposition letter, it is dispelled by the unrefuted testimony of Davis that employee Keenan expressed concern that Hart would impose a shorter cleanup time to prepare apartments for rental, and that employee Garvin expressed concern that Hart would change his hours.⁷ As the General Counsel has correctly noted in his brief, the property manager "possessed" and exercised authority "to control the day-to-day working conditions of the employees" at Parcwood. Thus, it is evident that the record establishes that Davis was acting in concert with other employees in opposing the selection of Hart as the property manager of the complex, and that the opposition was directly related to employee concerns about their working conditions.

The Board has held that "employee protest regarding the selection or termination of a supervisor who has an impact on employee working conditions is protected [activity]." *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987); *Oakes Machine Corp.*, 288 NLRB 456 (1988), enfd. 897 F.2d 84 (2d Cir. 1990); *Korea News*, 297 NLRB 537 (1990). Accordingly, I find that Davis was engaged in protected concerted activity when he drafted the letter in opposition to the selection of Hart as property manager, secured the employee signatures on it, and transmitted the letter to Domyan.

On the basis of the above, I find the General Counsel has proved a prima facie case which establishes that Davis was discharged on September 27 because the employee engaged in protected concerted activity in opposing the selection of Hart. I further find the Respondent has not persuasively rebutted the prima facie case by demonstrating it would have discharged Davis in any event, regardless of his protected activity. See *Wright Line*, 251 NLRB 1083 (1980).

It is clear from the unrefuted testimony in the record that when Domyan came to the Parcwood facility on September 27, he had termination checks already prepared for Davis and any of the other employees who continued to oppose his choice of Hart as property manager. Regardless of which

⁷ As noted, other than Davis, none of the employees who signed the opposition letter were called as witnesses in this hearing. In these circumstances, I do not credit Domyan's statement that "several" employees told him on September 27 they were "coerced" by Davis into signing the opposition letter. I find that his statements in this regard were based on a very selective memory and, therefore, unworthy of belief. This is especially true since Domyan demonstrated he was able to recall all the events of September 27 but, nonetheless, was unable to identify the employees who purportedly claimed to be coerced by Davis.

version (that of Davis or Domyan) of the Davis termination interview is considered, it is apparent that the focal point of their conversation was the letter in opposition to the selection of Hart. Thus, whether Domyan expressed disappointment in Davis and accused the employee of not being a "team player," or whether he asked the employee if he stood by contents of the opposition letter in no way alters the obvious conclusion that Davis' employment was terminated because of his expressed opposition to selection of Hart as the property manager.

The fact that the Respondent choose to characterize Davis' termination as a "resignation" does not modify my conclusions that the employee was terminated by Domyan. There is no evidence in the record indicating that Domyan was aware that Davis was seeking employment elsewhere at the time termination interview. Nor did the opposition letter contain language which would lead one to believe the signatory employees would resign if their views were rejected. It merely stated the employees "would consider another job offer," if Hart were selected for the position. In these circumstances, I find the record establishes that Davis was in fact terminated by the Respondent on September 27. I further find that his termination was the direct result of his participation in the employee opposition to the appointment of Hart as the property manager of the complex.

CONCLUSIONS OF LAW

1. The Respondent, Atlantic-Pacific Construction Co., Inc. d/b/a Atlantic-Pacific Management Co., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employee Larry Davis on September 27, 1991, because he engaged in protected concerted activity relating to employee working conditions, the Respondent has violated Section 8(a)(1) of the Act.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged employee Larry Davis, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall be required to expunge from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Atlantic-Pacific Construction Co., Inc. d/b/a Atlantic-Pacific Management Co., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in concerted activities which are protected under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Larry Davis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision. In addition, remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Parcwood facility in Sacramento, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

Accordingly, we assure you that:

WE WILL NOT discharge employees because they engage in concerted activities relating to employee working conditions which are protected under the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Larry Davis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify the Larry Davis that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

ATLANTIC-PACIFIC CONSTRUCTION CO., INC.
D/B/A ATLANTIC-PACIFIC MANAGEMENT